Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Petition for Declaratory Ruling on Issues	)
Contained in the Access Charge Litigation,	)
Sprint PCS v. AT&T	)
	)

CCT 01-316

SPRINT PCS PETITION FOR DECLARATORY RULING

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Attachment: Court Primary Jurisdiction Order
Sprint Spectrum L.P. v. *AT&T Corp.*, Case No. 00-0973-CV-W-5, Order (W.D. Mo., July 24, 2001).

Summary of Petition

Sprint PCS incurs costs when it terminates AT&T's long distance calls. Although Sprint PCS has asked AT&T to compensate it for the costs AT&T imposes on the Sprint PCS network, AT&T has refused to pay Sprint PCS. Sprint PCS therefore filed a collection lawsuit in state court, which AT&T successfully removed to federal court. AT&T argued that Sprint PCS' access charges are prohibited by the Communications Act and FCC policies, and the federal court has referred to the matter to the FCC.

1. There is no federal law or FCC policy that bars Sprint PCS from recovering its call termination costs from AT&T. There is no federal law or policy prohibiting Sprint PCS from recovering its costs from an IXC. The FCC has already recognized the right of CMRS carriers to recover their costs in providing exchange access.

2. The FCC should find that AT&T's refusal to pay access charges to Sprint PCS is unreasonably discriminatory. Sprint PCS performs for AT&T the same exchange access function that LECs provide — namely, as a result of the exchange access service, AT&T customers can successfully complete their long distance calls, and AT&T can get paid for its services, with AT&T's long distance rates designed to recover its end-to-end costs in providing its toll services. AT&T pays LECs when they provide exchange access, but it refuses to pay Sprint PCS for the costs Sprint PCS incurs in providing exchange access to AT&T. This is unreasonably discriminatory in contravention of Section 202(a) of the Communications Act.

3. The FCC should also rule that AT&T's refusal to pay access charges to Sprint PCS is unjust and reasonable. AT&T's refusal to pay Sprint PCS its call termination costs is unreasonable under Section 201(b) of the Communications Act given that (a) the rates AT&T charges its own customers is for end-to-end service, and (b) AT&T will receive no revenues from its customers if they cannot complete calls to Sprint PCS customers. AT&T thus receives a windfall on calls to Sprint PCS customers because unlike calls to customers served by landline networks, AT&T pays Sprint PCS nothing to terminate its calls.

AT&T also alleges that Sprint PCS' rates for exchange access are unreasonably high. AT&T has the burden of proof on this issue and Sprint PCS will respond to this claim once AT&T presents its supporting case.

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SPRINT PCS PETITION FOR DECLARATORY RULING

Sprint Spectrum. L.P., d/b/a Sprint PCS ("Sprint PCS"), pursuant to Commission Rule 1.2 and a primary jurisdiction order entered by the United States District Court for the Western District of Missouri,[1] asks the Commission to declare that neither the Communications Act nor Commission rules prohibit Sprint PCS from recovering from AT&T its costs of terminating AT&T's long distance traffic over the Sprint PCS mobile network. Sprint PCS further requests that the Commission declare that AT&T's refusal to compensate Sprint PCS for its call termination costs is an unjust and unreasonable practice in contravention of Section 201(b) of the Communications Act and unreasonably discriminatory in contravention of Section 202(a).

I. BACKGROUND FACTS

AT&T uses Sprint PCS' network to terminate long distance calls that its customers make to Sprint PCS customers. The function Sprint PCS performs in terminating this traffic is known as "exchange access."[2] AT&T pays landline telecommunications carriers the costs they incur

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[1] *See Sprint Spectrum L.P.* v. *AT&T Corp.*, Case No. 00-0973-CV-W-5, Order (W.D. Mo., July 24, 2001)("*Primary Jurisdiction Referral Order*"), a copy of which is appended hereto.

[2] *See* 47 U.S.C. § 153(16)("The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll serv-

when providing terminating exchange access to AT&T. However, AT&T has never paid Sprint PCS when it provides terminating exchange access to AT&T — despite Sprint PCS' repeated requests for compensation.

There are two primary means by which carriers are compensated for handling the traffic of another carrier. The first is referred to as "reciprocal compensation" whereby carriers are compensated for the transport and termination of local traffic on behalf of another carrier.[3] The reciprocal compensation rules generally apply in those situations in which two local carriers are exchanging traffic.[4] The second is referred to as "access charges" whereby a carrier is compensated for terminating long distance traffic on behalf of an interexchange carrier ("IXC"). While the actual service provided in both cases is similar, the FCC has concluded that, "as a legal matter, . . . transport and termination of local traffic are different services than access service for long distance telecommunications."[5]

Sprint PCS since its inception has collected reciprocal compensation payments for providing transport and termination to other local exchange carriers. In 1998, Sprint PCS began asking AT&T, along with other IXCs, to compensate it for the costs it incurs in terminating interexchange long distance traffic. Sprint PCS sent invoices to AT&T, but AT&T has refused to pay Sprint PCS. After further discussions between the parties proved fruitless, Sprint PCS filed in August, 2000, a collection action in the Circuit Court of Jackson County, Missouri.[6] Sprint

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ices."). Congress has recognized that CMRS carriers provide exchange access, but has determined that they need not provide "equal access." *Id.* at § 332(c)(8).

[3] *See generally,* 47 C.F.R. §51.701, *et seq.*

[4] *See, First Local Competition Order,* 11 FCC Rcd 15499, 16013 ¶1034 (1996).

[5] *Id.* at ¶1033.

[6] *See Sprint Spectrum* v. *AT&T Communications, Inc.*, 00-CV-021910, Petition (Aug. 9, 2000).

PCS raised three state law claims in its complaint: (1) breach of implied contract, (2) quantum meruit, and (3) action on account.

AT&T filed two documents the next month, on September 25, 2000. First, it filed notice to remove the case to the U.S. District Court of the Western District of Missouri. Sprint PCS opposed the referral since it had raised state law claims only, but on February 8, 2001, the federal court denied Sprint PCS' motion to remand.[7]

Also on September 25, 2000, AT&T filed an answer to the complaint in which it:

- "[A]dmits that calls from AT&T Corp.'s long distance customers to Sprint PCS' customers are terminated, in part, over Sprint PCS' wireless network;"
- "[A]dmits that Sprint PCS has demanded that it pay Sprint PCS certain 'access charges' and that Sprint PCS has submitted invoices purporting to represent the amounts that Sprint PCS alleges that AT&T Corp. owes to Sprint PCS;" and
- "[A]dmits that AT&T Corp. has refused to pay Sprint PCS' 'access charges.'"[8]

In a counterclaim, AT&T asserted that "by assessing 'access charges' on AT&T, Sprint PCS has engaged in, and continues to engage in, an unreasonable practice" in contravention of Section 201 of the Communications Act:

> Under the Federal Communications Act, Federal Communications Commission policies, and industry practice, wireless carriers (including AT&T's wireless affiliate) do not demand, and do not receive, any compensation from long distance carriers when they terminate calls from, or deliver calls to, the long distance carrier's networks.[9]

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[7] *See Sprint Spectrum L.P.* v. *AT&T Communications, Inc.*, Case No. 00-0973-CV-W-5, Order (W.D. Mo., Feb. 8, 2001)("*State Court Remand Order*"),

[8] Answer and Counterclaims of Defendant AT&T Communications, Case No. 00-0973-CV-W-5, at 3 ¶¶ 7-9 (Sept. 25, 2000).

[9] *Id.* at 7 ¶ 6 and 9 ¶ 16. In a separate count, AT&T alleged that Sprint PCS' assessment of access charges would contravene Section 254(k) of the Communications Act (*id.* at 9-10 ¶¶ 18-24), even though the FCC has already held that this statute does not apply to the issue at hand. *See, e.g., Sixth Access Charge Reform Order,* 15 FCC Rcd 12962, 12999 ¶ 92 (2000)("Section 254(k) was not designed to regulate the apportionment of [local distribution plant] between end users and IXCs.").

On April 2, 2001, two months after the federal court decided not to remand the case to state court, AT&T moved the court to refer the issues to the FCC under the doctrine of primary jurisdiction. The district court, while acknowledging that it had the authority to decide Sprint PCS' collection claims, concluded in a July 24, 2001 order that "referral to the FCC is appropriate in this matter":

> The crux of the dispute in this case involves whether Sprint may charge AT&T access fees for use of the Sprint PCS network and, if so, what rate may reasonably be charged for such services. Based on the foregoing discussion, these issues should be referred to the FCC for determination under the doctrine of primary jurisdiction, as they involve matters within the agency's special expertise and which require a uniform national resolution.[10]

The court stayed the case for eleven months (until June 24, 2002) and "directed" AT&T to "submit the appropriate filings to bring these issues before the FCC by Friday, August 24, 2001."[11] The Commission would thus have 10 months under this schedule to resolve the issues which, the court explained, is "twice as much time as allotted by statute to resolve the issues and give an incentive to AT&T to move expeditiously."[12] The court added that "[i]f the FCC is unable or unwilling to resolve the issues presented by this case within that time, then the court will proceed with the instant litigation."[13]

As of September 1, 2001, AT&T owed Sprint PCS over $60 million in access charges, sums that AT&T refuses to pay.

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[10] *Sprint Spectrum L.P.* v. *AT&T Corp.*, Case No. 00-0973-CV-W-5, Order, at 11 (W.D. Mo., July 24, 2001)("*Primary Jurisdiction Referral Order*"), a copy of which is appended hereto.

[11] *Id.* at 13.

[12] *Id.* at 12.

[13] *Id.*

II. THERE IS NO FEDERAL LAW OR COMMISSION POLICY THAT BARS SPRINT PCS FROM RECOVERING ITS CALL TERMINATION COSTS FROM AT&T

The prices that Sprint PCS charges for its commercial mobile radio services ("CMRS") are not regulated,[14] and the Commission has determined that providers of CMRS may not file access tariffs.[15] AT&T apparently concludes that because Sprint PCS' service prices are not regulated, it can use Sprint PCS' network for free. Under AT&T's theory of the case, Sprint PCS would be required to provide all its services for free because all of its services are not rate regulated.

AT&T has taken the position that it is under "no legal obligation to pay Sprint PCS access charges."[16] AT&T asserts that under industry practice, wireless carriers do not receive compensation from long distance carriers and that other wireless carriers do not charge for the provision of exchange access.[17] AT&T does not mention, however, that it was until recently the only major long distance carrier to refuse to compensate wireless carriers for the provision of exchange access. Indeed, AT&T's discriminatory action has now encouraged MCI/Worldcom to cease its previous policy of paying wireless access charges. Moreover, AT&T's factual premise is incorrect. Western Wireless has issued invoices to long distance carriers, and it is Sprint PCS' understanding that Verizon Wireless is in the process of issuing such invoices.

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[14] *See, e.g.,* 47 U.S.C. § 332(c)(3)(A); *Wireless Consumers Alliance,* 15 FCC Rcd 17021, 17033 ¶ 21 (2000)("We do not set CMRS rates."); *White v. GTE Class Action Order,* 16 FCC Rcd 11558 ¶ 16 (2001)("CMRS carriers are free to operated in a deregulated (i.e., non-tariffed), competitive market environment.").

[15] *See* 47 C.F.R. § 20.15(c). In adopting the prohibition seven years ago, the FCC stated that its forbearance of access tariffs would be "temporary." *See Second CMRS Order,* 9 FCC Rcd 1411, 1480 ¶ 179 (1994).

[16] Letter from Christine Jordin, AT&T District Manager, to Christy Frederas, Sprint PCS Access Service & Operations, at 1 (July 13, 1999).

[17] AT&T Answer and Counterclaim at 7 ¶ 6 and 9 ¶ 16.

In support of its position, AT&T cited "policy papers released by the FCC's professional staff recommend[ing] adoption of the very position that AT&T has adopted in its dispute with Sprint PCS."[18] One would think that an FCC staff proposal suggesting that in the future, access charges be replaced with bill-and-keep would only confirm Sprint PCS' right to receive access charges today. In fact, the Commission has squarely ruled that CMRS providers may recover from interexchange carriers ("IXCs") their cost of terminating long distance traffic:

> The Commission recently determined that the CMRS marketplace is sufficiently competitive to support forbearance from a tariff filing requirement for CMRS interstate access service. It should be noted, however, that in the Interconnection Order, the Commission stated that *cellular carriers are entitled to just and reasonable compensation for their provision of access.*[19]

Sprint PCS questions whether the Commission possesses the legal authority to prohibit it from recovering its call termination costs from long distance carriers. This is especially the case given the Commission's decision not to regulate CMRS rates for interstate access.[20]

AT&T contends, however, that it is unreasonable for Sprint PCS to recover its call termination costs from AT&T because Sprint PCS charges its own retail customers receiving incoming calls. This argument, of course, simply turns logic upside down. CMRS providers have been compelled to charge mobile customers for incoming calls because local exchange carriers ("LECS") and IXCs historically refused to pay CMRS carriers anything for their call termination

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[18] Suggestions in Support of Motion of AT&T for Referral of Issues to the FCC, Case No. 00-0973-CV-W-5, at 3 (April 2 2001), *citing* Patrick DeGraba, Bill and Keep at the Central Office as the Efficient Interconnection Regime, OPP Working Paper No. 33 (Dec. 2000).

[19] *CMRS Equal Access/Interconnection,* 9 FCC Rcd 5408, 5447 ¶ 83 (1994)(emphasis added), *citing Interconnection Order*, 2 FCC Rod 2910, 2915 (1987). Curiously, the next year and without reciting these 1987 and 1994 orders, the FCC stated that "[w]e have never addressed . . . whether . . . IXCs should remit any interstate access charges to CMRS providers when the LEC and the CMRS provider jointly provide access service." *LEC/CMRS Interconnection NPRM,* 11 FCC Rcd 5020, 5074 ¶ 115 (1995).

costs.[21] Thus, AT&T appears to be saying that because Sprint PCS has been compelled to respond to AT&T's refusal to compensate Sprint PCS for its costs, AT&T should forever be entitled to free service — unlike other telecommunications carriers that terminate traffic over Sprint PCS' network.

The simple response to this AT&T argument is that the Commission has already rejected it:

> [W]e reject NYNEX's argument that mutual compensation for [interstate] switching is inappropriate because the cellular operator may be recovering its costs from its subscribers. Rather, we agree with the cellular oppositions that *a cellular carrier's subscriber rates, or the costs recovered, are not germane to the issue of mutual compensation arrangements between co-carriers.*[22]

The same very situation exists with regard to local intrastate traffic. Although CMRS carriers often charge their customers for receiving local calls, the Commission has nevertheless held that the originating carrier is responsible for compensating the CMRS carrier for the costs the CMRS carrier incurs in terminating the others' traffic.[23]

In summary, there is no federal law or Commission policy that prohibits Sprint PCS from recovering from AT&T its call termination costs incurred in terminating AT&T traffic. If AT&T believes that the rates Sprint PCS is imposing for exchange access are unreasonably high, it may file a complaint pursuant to Section 201(b) and 208 of the Communications Act.

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[20] Of course, the FCC has the authority to determine that the rates Sprint PCS charges are too high and, as a result, unjust and unreasonable. *See* 47 U.S.C. § 201(b). However, AT&T has the burden of establishing that the access charges that Sprint PCS is assessing are excessive and unreasonably high.

[21] While CMRS carriers have begun to receive some compensation for terminating local (intraMTA) calls, the level of compensation does not begin to recover actual CMRS call termination costs. *See Unified Intercarrier Compensation Regime NPRM*, Docket No. 01-92, FCC 01-132, at n.54 (April 27, 2001).

[22] *Cellular Interconnection Reconsideration Order,* 4 FCC Rcd 2369, 2373 ¶ 27 (1989)(empha-sis added).

[23] *See* 47 C.F.R. § 51.703(a); *First Local Competition Order,* 11 FCC Rcd 15499, 15517 ¶ 34, 15997 ¶ 1008, 16016 ¶ 1041, and 16018 ¶ 1045 (1996).

III. THE COMMISSION SHOULD FIND THAT AT&T'S REFUSAL TO PAY ACCESS CHARGES TO SPRINT PCS IS UNREASONABLY DISCRIMINATORY

AT&T pays some telecommunications carriers for terminating AT&T's long distance traffic, but it refuses to pay Sprint PCS when Sprint PCS performs the identical function for AT&T. It appears that the only reason that AT&T refuses to pay Sprint PCS is because Sprint PCS uses radio spectrum rather than wired cables in the provision of its exchange access services. Sprint PCS submits that this AT&T practice constitutes unreasonable discrimination in violation of Section 202(a) of the Communications Act.

Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[24] There is a three-pronged test for determining whether a carrier's conduct violates the anti-discrimination provision of section 202(a): "(1) whether the services at issue are 'like'; (2) if the services are 'like,' whether the carrier treats them differently; and (3) if the carrier treats the services differently, whether the difference is reasonable."[25]

The exchange access services that Sprint PCS provides to AT&T are "like" the exchange access services that LECs provide to AT&T. In both instances, as a direct result of the exchange access services provided, AT&T is able to successfully complete calls made by its customers (and thereby receive customer revenues for successful call completion). AT&T has admitted that it discriminates against Sprint PCS by paying LECs for their exchange access services but not paying Sprint PCS for its exchange access services. The only difference between Sprint PCS and LECs is the technology used in completing the AT&T calls (radio spectrum vs. wired cable). However, the technology used in the provision of exchange access has no relevance to the ques-

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[24] 47 U.S.C. § 202(a).

[25] *Total Telecommunications* v. *AT&T,* FCC 01-84, 16 FCC Rcd 5726 at ¶ 33 (2001).

tion of whether the exchange access provider is entitled to payment for services rendered. What is relevant is that (a) AT&T is able to complete successfully calls made by its customers as a result of Sprint PCS exchange access services (and get paid as a result), and (b) Sprint PCS incurs an economic cost in providing this function to AT&T.

Sprint PCS therefore asks the Commission to rule that AT&T's refusal to compensate Sprint PCS for the costs Sprint PCS incurs in terminating AT&T traffic is unlawful and unreasonably discriminatory in contravention of Section 202(a) of the Communications Act.

IV. THE COMMISSION SHOULD ALSO RULE THAT AT&T'S REFUSAL TO PAY ACCESS CHARGES TO SPRINT PCS IS UNJUST AND UNREASONABLE

Sprint PCS also asks the Commission to rule that AT&T's refusal to compensate it for the costs of terminating AT&T traffic constitutes an unjust and unreasonable practice in contravention of Section 201(b) of the Communications Act.

Section 201(b) provides that "any charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[26] We today operate under a calling-party's network-pays ("CPNP") regime, whereby the "calling party's network pays to terminate a call":

> Existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call.[27]

So long as we operate under a CPNP regime, the calling party's network (here, AT&T) cannot "pick and choose" which terminating carriers it will pay, and which terminating carriers it will

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[26] 47 U.S.C. § 201(b). Section 201 ordinarily applies to interstate services only, and not to intrastate services. However, Section 332(c)(1) expressly authorizes the FCC to order any "common carrier" to interconnect with a CMRS provider "pursuant to section 201 of this title." *Id.* at § 332(c)(1)(B). FCC authority under Section 332(c) applies to all traffic, including intrastate traffic. *See id.* at § 2(b)("Except as provided in . . . . section 332 . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service."

not pay. Although the Commission is in the process of reviewing the current intercarrier compensation regime, the existing rules must be applied in a non-discriminatory manner. Simply stated, AT&T does not have the discretion to determine when it will pay a carrier's call termination costs, and AT&T's refusal to pay Sprint PCS its call termination costs after Sprint PCS specifically requested payment is arbitrary and by definition, unjust and unreasonable.

AT&T's refusal to pay Sprint PCS its call termination costs is especially unreasonable given that (a) the rates AT&T charges its own customers is for end-to-end service, and (b) AT&T will receive no revenues from its customers if they cannot complete calls to Sprint PCS customers. AT&T thus receives a windfall on calls to Sprint PCS customers because unlike calls to customers served by landline networks, AT&T pays Sprint PCS nothing to terminate the calls.

In *Total Communications* v. *AT&T*, the Commission determined that an incumbent LEC had established a "sham" company in an attempt to collect unreasonably high access charges.[28] The Commission nonetheless rejected AT&T's argument that it should be entitled to free exchange access service because the incumbent LEC engaged in unlawful activity:

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[27] *Unified Intercarrier Compensation Regime NPRM*, Docket No. 01-92, FCC 01-132, at ¶ 9 (April 27, 2001). In this NPRM, the FCC has sought comment on "the eventual application of bill and keep to interstate access charges regulated under section 201 of the Communications Act." *Id.* at ¶ 4.

[28] *See Total Telecommunications* v. *AT&T*, 16 FCC Rcd 5726 (2001).

> We reject AT&T's argument that the lawful relationship between Atlas and Total, in and of itself, makes it unreasonable for Total to charge anything for the access services provided to AT&T. Complainants did provide a service to AT&T, *i.e.*, complete calls from AT&T's customers to Audiobridge. Moreover, AT&T recovered revenue through ordinary long-distance rates from its own customers for calls completed to Audiobridge.[29]

If an incumbent LEC that violated the Communications Act is able to recover its costs of terminating AT&T's long distance traffic, clearly Sprint PCS, which has engaged in no unlawful activity, is entitled to recover from AT&T its costs of call termination.

The Commission has long had a vision that CMRS providers like Sprint PCS would provide competition to incumbent LECs.[30] Sprint PCS cannot possibly become a meaningfully competitor to ILECs if ILECs receive access charges for terminating long distance calls while Sprint PCS does not.[31]

V. CONCLUSION

For the foregoing reasons, Sprint PCS respectfully requests that the Commission confirm that there is no federal law or policy that prohibits Sprint PCS from recovering its call termination costs from AT&T. The Commission should additionally rule that AT&T's refusal to compensate Sprint PCS, in response to a specific request for payment from Sprint PCS, contravenes both Section 201(b) and 202(a) of the Communications Act. Sprint PCS will defer responding to AT&T's additional allegation that Sprint PCS' prices for exchange access are too high because

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[29] *Id.* at ¶ 37.

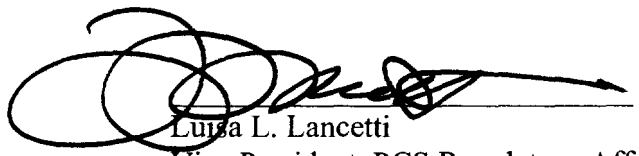
[30] *See, e.g., First Annual CMRS Report,* 10 FCC Rcd 8844, 8869 ¶ 75 (1995)(LEC/CMRS "competition would be a major pro-competitive development in the telecommunications business.").

[31] *See, e.g., Second Annual CMRS Report,* 12 FCC Rcd 11266, 11325 (1997)("Interconnection charges that address the actual costs of interconnection will allow CMRS providers and wireline providers to complete based not on some cost advantage stemming from control of monopoly-based facilities, but on the services they offer.").

AT&T has the burden of proof on this issue and Sprint PCS must review the grounds of AT&T's allegations before it can respond.

Respectfully submitted,

SPRINT SPECTRUM L.P., d/b/a Sprint PCS



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October 22, 2001

Attachment

Court Primary Jurisdiction Order *Sprint Spectrum L.P.* v. *AT&T Corp.*, Case No. 00-0973-CV-W-5, Order (W.D. Mo., July 24, 2001).

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SPRINT SPECTRUM L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 00-0973-CV-W-5
	)	
AT&T CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Pending before the Court is Defendant AT&T Corporation's ("AT&T") Motion for Referral of Issues to the FCC Under the Doctrine of Primary Jurisdiction and for Dismissal or a Stay Proceedings Pending the Referral [Doc. 31]. For the reasons discussed below, AT&T's motion will be granted. Portions of this case will be referred to the FCC for further proceedings and the Court will stay all remaining proceedings in this matter.

I. Factual Background

Sprint Spectrum, L.P. ("Sprint") is a provider of wireless communication services throughout the country. AT&T is a provider of wireline long distance services to residential and business customers throughout the country. Sprint has filed the instant lawsuit against AT&T seeking collection of money Sprint claims is owed by AT&T. Sprint's Petition, originally filed in state court and later removed to this Court, contains three state law claims: breach of contract, quantum meruit, and action on account. Its claims all stem from AT&T's failure to pay Sprint for its alleged use of Sprint's wireless

communications network.

Sprint operates a wireless communications network under the trade name "Sprint PCS." As noted above, AT&T provides interstate and intrastate telephone long distance services. In providing such services, AT&T depends upon local carriers, including wireless carriers such as Sprint PCS, to connect end-user customers with AT&T's long distance network. In particular, Sprint claims that AT&T uses the Sprint PCS network to terminate toll calls made by AT&T long distance customers to Sprint PCS customers. Sprint also asserts that AT&T uses the Sprint PCS network to originate certain calls.

Sprint states that it has repeatedly informed AT&T of its expectation that it be compensated by AT&T for AT&T's continued use of the Sprint PCS network. Sprint alleges that it has sent and continues to send AT&T monthly statements itemizing the access charges that Sprint imposes to recover its costs for the services rendered.[1] AT&T, however, has refused to pay Sprint these access charges. Sprint claims that as of July 31, 2000, AT&T owed Sprint more than $11.8 million.

In response to Sprint's claims, AT&T has filed three counterclaims. It alleges that Sprint's access rates are unreasonable, and thus in violation of Section 201 of the Communications Act. AT&T further alleges that Sprint's assessment of access charges to AT&T is an unreasonable practice, also in violation of Section 201 of the Communications Act. Finally, AT&T alleges that Sprint unlawfully uses

[1]In its suggestions in opposition to AT&T's motion, Sprint states that the access rates it charges for access to the Sprint PCS network are the same rates charged by the predominate local exchange carriers in an area (for intrastate access) or by the National Exchange Carriers Association (for interstate access).

or attempts to use revenues from access services to subsidize the costs of providing its wireless services, a cross-subsidy in violation of Section 25(k) of the Communications Act.

II. Discussion

A. Introduction

AT&T asserts in its Motion for Referral of Issues to the FCC that the critical issues presented in this case are (1) whether a wireless carrier should be permitted to charge a long-distance carrier for terminating calls from (or delivering calls to) the long-distance carrier, and (2) if so, at what rate. Such issues, it argues, should be referred to the Federal Communications Commission ("FCC") for further consideration. Moreover, during the pendency of such referral, AT&T asserts that the instant suit must be stayed or dismissed. Sprint, in contrast, argues that referral to the FCC is unnecessary because Sprint's claims are based only on state-law theories well within the Court's experience.

AT&T's position is based upon the doctrine of primary jurisdiction. "Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making." *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (citing *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988)). "The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court." *Id.* (citing *Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982)). "There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction." *Id.* (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). Instead, courts must

consider in each case "whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created." *Id.* (citing *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984)). Added expense and undue delay that may result from referral to an administrative agency make courts hesitant to apply the doctrine when appropriate reasons are lacking. *See id.*

Ultimately, the doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Western Pac. R.R.*, 352 U.S. at 63. In furtherance of this goal, there are two primary reasons that courts apply the doctrine of primary jurisdiction. The first, and most common, "is to obtain the benefit of an agency's expertise and experience." *Access Telecommunications*, 137 F.3d at 608. "The principle is firmly established that 'in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.'" *Id.* (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)). The second reason "is to promote uniformity and consistency within the particular field of regulation." *Id.* (citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976)). Thus, in considering the propriety of a primary jurisdiction referral, courts focus particularly on two questions: whether the issues raised in a case "have been placed within the special competence of an administrative body" and whether a case poses the possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy. *Western Pac. R.R.*, 352 U.S. at 64.

In the instant lawsuit, AT&T contends that both rationales for application of the primary jurisdiction doctrine exist. Specifically, AT&T argues that the decision regarding whether wireless carriers may impose access charges on long-distance providers and, if so, at what rate, are ratemaking issues that fall squarely within the FCC's special expertise and that require uniform national resolution.

B. Application of the Primary Jurisdiction Doctrine

In support of its position that this matter turns upon issues within the FCC's primary jurisdiction, AT&T initially notes that Congress has given the FCC the power to declare as unlawful any charge or practice that is unjust or unreasonable. *See* 47 U.S.C. §§ 201(b) and 332(c)(1). Further, as AT&T points out, Congress has stated that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." 47 U.S.C. § 332(c)(3)(A). The Court notes, however, that it is not a "state or local government," so there is no indication that Congress has prohibited the Court from considering issues related to rates charged by commercial mobile radio service ("CMRS") carriers, such as Sprint PCS. While the Court sees no statutory reason it may not consider issues regarding rates charged by entities such as Sprint, the primary jurisdiction doctrine may warrant referral by the Court to the FCC, in particular because issues of rate reasonableness are involved.

In *Access Telecommunications*, the Eighth Circuit discussed the primary jurisdiction doctrine in the context of a dispute over charges billed to a reseller of long-distance services under a filed tariff. 137 F.3d at 608-09. The court stated that challenges to the reasonableness of a tariff are "properly brought before an administrative agency." *Id.* at 608. *See also Southwestern Bell*

Telephone Co. v. Allnet Communications Services, Inc., 789 F.Supp. 302, 304 (E.D. Mo. 1992) (citing *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) (further citations omitted)).

The Eighth Circuit has also previously acknowledged this principle in contexts other than the telecommunications industry. *Iowa Beef Processors* involved a dispute in the transportation industry context concerning whether carriers have an obligation to supply meathooks when transporting carcass beef via "piggyback" rail service. 685 F.2d at 257-58. The court held that whether the carrier had "assumed such a duty should be determined in the first instance by the [Interstate Commerce Commission]." *Id.* at 260. The court noted that the primary jurisdiction doctrine requires referral to an administrative agency when the claim involves "an inquiry into the lawfulness of a carrier's practice . . . or when problems of cost allocation are relevant to and intertwined with the issue of tariff construction." *Id.* at 261 (citations omitted). Further, the *Iowa Beef Processors* court stated that the question presented by the case "directly implicates the ratemaking process, and, therefore, application of the doctrine of primary jurisdiction requires reference to the ICC." *Id.*

Courts in other jurisdictions have also held that where issues of rate reasonableness are involved, referral to an administrative agency is appropriate. For example, the recent case of *Advamtel, LLC v. AT&T Corp.*, 105 F.Supp.2d 507 (E.D. Va. 2000), presented analogous issues to those involved in the instant lawsuit. In that case, sixteen competitive local exchange carriers ("CLECs") brought a collection

action against AT&T.[2] Similar to the instant suit, the dispute arose from the CLECs "unsuccessful efforts to collect fees allegedly owed to them by AT&T for use of [the CLECs] local exchange networks in routing long distance telephone calls." *Id.* at 509. In response to the lawsuit, AT&T filed a counterclaim in which it stated six claims, including claims for unreasonable practices, unreasonable rates, and illegal use of cross-subsidies, all counterclaims that AT&T has also raised in this lawsuit. After discussing the general principles behind the doctrine of primary jurisdiction, the court in *Advamtel* stated:

> One issue typically referred to the FCC under the primary jurisdiction doctrine is the reasonableness of a carrier's tariff because that question requires the technical and policy expertise of the agency, and because it is important to have a uniform national standard concerning the reasonableness of a carrier's tariff, as a tariff can affect the entire telecommunications industry.

Id. at 511 (citing *MCI Telecommunications Corp. v. Ameri-Tel, Inc.*, 852 F.Supp. 659, 665 (N.D. Ill. 1994)). The court in *Advamtel* therefore held that AT&T's claims of unreasonable rates and illegal cross-subsidies should be referred to the FCC. *Id.* Further, in a subsequent order, the court referred additional issues and ordered that the remaining issues in the case be stayed for a period of time. [See Exh. A to AT&T's Reply Sugg.].

In response to AT&T's suggestion that this case involves issues within the special expertise of the FCC, Sprint argues that its state law claims do not involve the Communications Act or require referral to the FCC. Sprint notes that there are no tariffs to interpret or regulated rates to approve. It

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[2]Sprint Communications Company was also originally included as a defendant. The claims against it and AT&T, however, were severed by the court. *See Advamtel*, 105 F.Supp.2d at 508 n.2.

characterizes its claims as nothing more than a collection action in which it seeks to recover money owed for services rendered under state law theories well within the Court's experience.

Sprint's lawsuit does not involve an existing tariff. If this were nothing more than an action to enforce such a tariff, the Court would agree that there would be no need to refer such an issue to the FCC. *See Access Telecommunications*, 137 F.3d at 608 (citation omitted). As Sprint acknowledges, however, it is not asking the Court to simply enforce an existing written agreement. There is no tariff that has been filed which serves as the basis for Sprint's allegation that AT&T owes it upwards of $11.8 million. Instead, Sprint seeks recovery based on the theory of quantum meruit and an implied contract. Given these facts, the Court would agree that it would perhaps be within its province to pass upon the question of whether such an implied contract exists, but the Court fails to see how Sprint may ultimately obtain any relief in this matter without a determination as to the reasonableness of the rates for Sprint's services that AT&T has utilized. In Sprint's own claim for "action on account" Sprint alleges that its rates are "reasonable." This is clearly a fact that must be proven and one which the FCC is in a better position than the Court to evaluate. Likewise, the FCC is in a better position to evaluate whether Sprint may properly charge for the services which it has provided to AT&T.

Referral to the FCC is especially appropriate in this case for the additional reason that only the FCC can ensure a uniform national resolution of the issues presented. As noted above, in addition to the need for agency expertise, the need for uniformity and consistency within a particular field is a basis for application of the primary jurisdiction doctrine. *See DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998) (citing *Far East Conference*, 342 U.S. at 574); *see also*

Access Telecommunications, 137 F.3d at 608 (citing *Allegheny Airlines,* 426 U.S. at 303-04). The Court believes that the need for uniformity in regulation of wireless carriers' access fees is important, for if the question is left to courts in the first instance, the possible result is a patchwork of regulations that may ultimately lead to competitive advantage for certain wireless carriers. Moreover, this case presents policy questions that require uniform resolution if possible. In particular, the question presented by Sprint's claims as to whether Sprint may even charge AT&T for access to the Sprint PCS network raises an economic policy question regarding who should ultimately compensate carriers like Sprint PCS for such access – interexchange carriers such as AT&T or Sprint's own end-users. The FCC is clearly better able to consider the economic ramifications raised by this issue and to impose a uniform result.

Sprint, however, argues that the claims involved here do not present any issues that the FCC has not already addressed. Specifically, Sprint asserts that the FCC has already determined that CMRS carriers, like Sprint PCS, provide access services and that free market forces will determine the price of such services. Therefore, Sprint suggests that the FCC has already decided that it will not regulate the access charges imposed by Sprint PCS. The Court disagrees.

As AT&T points out, Sprint's first assertion, that CMRS carriers provide access services, is irrelevant in this matter. Indeed, the parties do not dispute this fact and whether companies such as Sprint provide such services does not bear on the question of how much may be charged for such services. Sprint's second point, that the FCC has decided not to regulate the charges involved in this case, is based upon unconvincing authority.

In support of its position, Sprint quotes a paragraph from an FCC order stating that the FCC will "*temporarily* forebear from requiring or permitting CMRS providers to file tariffs for interstate access service." *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, ¶179 (March 7, 1994) (emphasis added).[3] This order, issued over seven years ago, states a tentative conclusion at best. In a much more recent pronouncement, the FCC has requested comments on a proposed change to intercarrier compensation structures, stating that it is "particularly interested in identifying a unified approach to intercarrier compensation – one that would apply to interconnection arrangements between all types of carriers interconnecting with the local telephone network, and to all types of traffic passing over the local telephone network." *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Dkt. No. 01-92, FCC 01-132, ¶2 (April 27, 2001); [Exh. D to AT&T's Reply Sugg.].[4] Further, in an order issued the same day relating to access rates in the analogous CLEC context, the FCC stated that

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[3]Sprint also cites *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021 (Aug. 14, 2000). As AT&T points out, however, Sprint's citation is misplaced, as the FCC order in that case deals with end-user charges and not access charges.

[4]Sprint acknowledges the FCC's recently issued Notice of Proposed Rulemaking ("NPRM"). Sprint asserts, without citation to any authority, that the NPRM is not a reason for referral of the issues in this lawsuit because the FCC will at most consider changing access rate structures in the future. As AT&T notes, however, if the FCC resolves this case through adjudication, such a decision could apply retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 224 (1988) (Scalia, J., concurring) (citations omitted). Further, if the FCC proceeds through rulemaking, any result would be "persuasive, if not conclusive, as to questions concerning past events." *Advamtel, LLC v. Sprint Communications Co., L.P.*, 125 F.Supp.2d 800, 806 (E.D. Va. 2001). *See also MCI Telecomm. Corp. v. FCC*, 10 F.3d 842, 846-47 (D.C. Cir. 1993) (prospective rulemaking "does not mean that . . . [if] the Commission has found conduct unlawful it has thereby found that the identical conduct was lawful in the past").

CLECs would be allowed to file tariffs on their access rates. *See In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 96-262, FCC 01-146, ¶51 (April 27, 2001); [Exh. C to AT&T's Reply Sugg.]. The FCC also noted that it was giving "serious consideration" to moving toward a "bill and keep" approach for intercarrier compensation, the position adopted by AT&T in its dealings with Sprint PCS.[5] *See id.* at ¶53. Thus, the Court believes that regulation of access charges by CMRS carriers is far from settled from the FCC's perspective at this time. Moreover, Sprint does not point to any affirmative statement suggesting that the FCC has taken a firm position against regulating such charges.

In sum, the Court concludes that referral to the FCC is appropriate in this matter. The crux of the dispute in this case involves whether Sprint may charge AT&T access fees for use of the Sprint PCS network and, if so, what rate may reasonably be charged for such services. Based on the foregoing discussion, these issues should be referred to the FCC for determination under the doctrine of primary jurisdiction, as they involve matters within the agency's special expertise and which require a uniform national resolution.

Referral of the above-mentioned issues to the FCC raises a final question regarding whether this case should be stayed or dismissed. Sprint argues that dismissal would be unfairly prejudicial and that a stay would be more appropriate. Sprint points out that the FCC is statutorily obligated to investigate

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[5]Under the "bill and keep" approach, a terminating wireless or wireline carrier does not bill a long distance carrier for terminating a call, but instead recovers its costs exclusively from its own end-users. *See* Patrick DeGraba, Bill and Keep at the Central Office as the Efficient Interconnection Regime, OPP Working Paper No. 33 (Dec. 2000) (on file with the Office of Plans and Policy, Federal Communications Commission); [Exh. B to AT&T's Sugg. in Support].

complaints and issue an order within five months of filing. *See* 47 U.S.C. §§208(a) and (b)(1). Sprint suggests, however, that this is more often the exception than the rule and therefore that a five month stay should be entered to avoid its claims getting "lost" at the FCC. AT&T asserts, in contrast, that a dismissal is appropriate because the FCC is likely to resolve the dispositive issues in this case. Further, AT&T states that if a stay is entered, five months is likely to be an inadequate time period for the FCC to resolve the issues.

When issues are referred to an administrative agency under the doctrine of primary jurisdiction, the Court may stay the case to give the parties a "reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). Alternatively, in its discretion, "if the parties [will] not be unfairly disadvantaged," the Court may dismiss the case without prejudice. *Id.* at 268-69. In this case, the Court will exercise its discretion to stay the case for ten months in order to allow the parties to seek resolution of the issues before the FCC. This will allow the FCC twice as much time as allotted by statute to resolve the issues and give an incentive to AT&T to move expeditiously. If the FCC is unable or unwilling to resolve the issues presented by this case within that time, then the Court will proceed with the instant litigation.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendant AT&T Corporation's Motion for Referral of Issues to the FCC Under the Doctrine of Primary Jurisdiction and for Dismissal or a Stay Proceedings Pending the Referral [Doc. 31] is GRANTED. The questions of whether Sprint may charge access fees to AT&T for access

to the Sprint PCS wireless network and, if so, the reasonableness of Sprint's charges for such services are referred to the FCC for further consideration. It is further

ORDERED that Defendant AT&T Corporation is directed to prepare and submit the appropriate filings to bring these issues before the FCC by Friday, August 24, 2001. It is further

ORDERED that this case is STAYED until June 24, 2002. If, by that time, the FCC has not ruled on the referred issues, this Court will proceed with the instant litigation. It is further

ORDERED that the parties are directed to file a joint report on the status of the FCC proceedings six (6) months from the date of this Order.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: July 24, 2001
Kansas City, Missouri

Certificate of Service

I, Anthony Traini, hereby certify that on this 22nd day of October, 2001, I caused copies of the foregoing "Sprint PCS Comments" to be hand delivery to the parties listed below:

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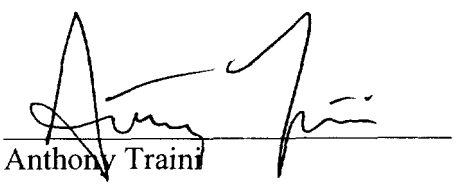

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